



STATE OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL

**LUTHER STRANGE
ATTORNEY GENERAL**

**OFFICE OF THE ATTORNEY GENERAL
CONTINUING LEGAL EDUCATION
SEMINAR**

**State Capitol Auditorium
Thursday, May 7, 2015**

AFTERNOON SESSION

3:45 PM – 4:45 PM

Ethics

**Ted Hosp
Maynard Cooper**

Ted Hosp, Maynard Cooper & Gale, PC

Ted Hosp has been practicing law in Alabama for twenty years, and is a recognized leader in the areas of Government Ethics Laws, the Legislative and Regulatory Process and Campaign Finance law. He has served as an adjunct professor of law at the University of Alabama School of Law on ethics and election law, and as a trainer on ethics and campaign finance law for organizations such as the Association of County Commissioners of Alabama for more than a decade. He is a founder, and the current Chair of the Alabama State Bar Section on Ethics, Elections and Government Relations Law. His legislative and regulatory clients include Wal-Mart, Blue Cross & Blue Shield, the Business Council of Alabama, the Alabama Land Title Association, Baptist Healthcare and IBM. He also serves as an Administrative Law Judge for Alabama's State Health Planning and Development Agency, focusing on Certificates of Need. From 1999 to 2003, he served as Legal Advisor to the Governor of Alabama. Before joining Maynard, Cooper & Gale he served as a law clerk to the Honorable Harold Albritton, United States District Judge for the Middle District of Alabama from 1994-1995, and from 1989 to 1991, he served on the staff of the United States Senate Committee on the Judiciary.

He serves on the Alabama Access to Justice Commission, which was established by the Alabama Supreme Court in 2007, and served as the Commission's first Chair from 2007-2011. He has served on the board of the Birmingham Volunteer Lawyers Program, and currently serves on the Alabama State Bar Committee on Volunteer Lawyers Programs, and on the boards of the Montgomery Bar Volunteer Lawyers Program and the Middle District of Alabama Federal Defenders Program. In 2014, he formed a non-profit Foundation that raises money to assist students of limited in Alabama's 7th Congressional District take internships in the Washington Office of Congresswoman Terri Sewell.

He has been named to *Best Lawyers in America* from 2009 to the present, an *Alabama Super Lawyer* from 2008 to the present, and is rated Av Preeminent by Martindale Hubbell.

THE ALABAMA ETHICS ACT

Edward A. "Ted" Hosp
thosp@maynardcooper.com
334-233-7157 (cell)

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

"[L]ife, as we have known it in the past,
no longer exists."

Ethics Commission Executive Director Jim
Sumner, at the first mandated ethics training
session in Montgomery on January 24, 2011.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Three Most Relevant Provisions

- Receiving anything, no matter the value, that is given to "corruptly influence official action" (§36-25-7).
- Use of office for personal gain (§36-25-5)
 - Active use of the office (e.g., voting, etc.)
 - Operating within your "sphere of influence"
- Receipt of a "thing of value" (§36-5-5.1).

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

"Corruptly Influencing Official Action"

- Alabama Code § 36-25-7 - Prior to 2010:
 - "No person shall offer or give to a public official or public employee or a member of the household of the public official or public employee and none of the aforementioned shall solicit or receive a thing of value for the purpose of influencing official action."
- Provision was interpreted as an anti-bribery provision requiring a quid pro quo. Advisory Opinion 2011-01:
 - "[s]ince 1995, when the previous Ethics Law went into effect, all the activities set out in this opinion were permissible under the above-listed exceptions, unless they were offered in exchange for official action on the part of the public official or the public employee." Ethics AO 2011-01 at 7.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Corruptly Influencing Official Action”

▪ Current §36-25-7

- “No person shall offer or give to a public official or public employee or a member of the household of the public official or public employee and none of the aforementioned shall solicit or receive **anything** for the purpose of **corruptly** influencing official action regardless of whether or not the thing solicited or received is a thing of value.”

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Corruptly Influencing Official Action”

▪ “Corruptly” defined in §36-25-7(e)

- For purposes of this section, to act “corruptly” means to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.
- The generally held view is that the use of the term “corruptly” in §36-25-7 means that there is a requirement that there be a bargained for exchange of some sort, but not necessarily a quid pro quo.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Use of Office for Personal Gain

▪ Alabama Code § 36-25-5

- “No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain.”

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Active Use of Office for Personal Gain

▪ Alabama Code § 36-25-5

- Public official or public employee
- Use his or her office
- To obtain gain
- For himself or herself, or family member, or any business with which the person is associated.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Active Use of Office for Personal Gain

- What is “gain”?
 - Gain is not defined by the Ethic Act.
 - It should be assumed, though, that any receipt of funds or benefits could constitute “gain.”
 - *Chandler v. State*, 1994 – Mayor sold property for less than appraised value as part of a business development project.
 - Court held gain was realized because Mayor paid off a loan and received more than his family paid for the land several decades earlier.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Active Use of Office for Personal Gain

- Who are your “family members”?
 - For a Public Official:
 - The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse’s parents, a sibling and his or her spouse, of the public official.
 - For a Public Employee:
 - The spouse or a dependent of the public employee.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Active Use of Office for Personal Gain

- What is a “business with which the person is associated”?
 - Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Active Use of Office for Personal Gain

- How does one “use” his or her office?
 - Steering, influencing or promoting particular projects, contracts or vendors;
 - Participating in debate or discussion regarding the matter;
 - Voting on an issue;
 - Being present to ensure a quorum is reached.
 - **Must be something that you can do or influence by virtue of your status as a public official.**

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Active Use of Office for Personal Gain

- How does one avoid using his or her office?
 - DISCLOSE: Immediately disclose any interest you, your family, or your business may have in a particular matter;
 - REMAIN SILENT: Do not discuss, promote or steer the matter in any particular direction;
 - ABTAIN: Formally abstain from any discussion or vote on the matter, and preferably leave the room for any discussion or vote;
 - GET AN OPINION: Get a written opinion from the Ethics Commission, the County Attorney or a private attorney.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Sphere of Influence - Personal Gain

- Opinion 2000-20 to Rep. Oliver Robinson created a new analysis for the use of office for gain when a public official interacts with any other public entity.
- A public official is not permitted to seek work, contracts, grants, etc. for himself/herself or his/her family members or business from another public entity that is within the official's "sphere of influence."

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Sphere of Influence - Personal Gain

- The sphere of an official's influence is better stated as the official's reach of power or authority as a public official.
- A state official or legislator would have the broadest sphere of influence because they influence all public entities in Alabama.
- A county official's sphere of influence would presumably be limited to other public entities within that particular county.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

"Thing of Value"

- Alabama Code § 36-25-5.1
 - Lobbyists and Principals are specifically prohibited from providing a "thing of value" to any public official or public employee.
 - A Principal is any entity that employs a lobbyist.
 - If a company is a principal it is not clear which of its employees, board members or officers are considered principals.
 - If that company is paying for anything, either directly or through reimbursement, then it is subject to the restrictions of § 36-25-5.1.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value”

- What is, and what is not a “thing of value” is defined in detail by the Ethics Act.
 - The former Ethics Commission Director and the General Counsel have interpreted the definition of “thing of value” to prohibit **everyone** from providing a “thing of value” to a public official or public employee.
- You therefore are the safest if you limit what you may accept from anyone to those things that are not included in the definition of “thing of value.”

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value”

- Exceptions to “Thing of Value”
 - Campaign contributions or contributions to an inaugural or transition committee;
 - Anything given by a family member under circumstances which make it clear that the gift is motivated by a family relationship;
 - Anything given by a friend under circumstances which make it clear that the gift is given due to the friendship;
 - Items of little intrinsic value such as plaques or certificates, or items and services of de minimus value. “De minimus” is defined as anything less than \$25 in value;
 - Anything available to the general public or a broad class of individuals such as loans, discounts, and “opportunities and benefits, and rewards and prizes given in contests or events including random drawings;”
 - Benefits earned by a public official or employee through a non-government employer where it is clear that those benefits are provided for reasons unrelated to the person’s public service.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Gifts

- Gifts from a family member
 - under circumstances which make it clear that [the thing given] is motivated by a family relationship;
- Gifts from a friend
 - under circumstances which make it clear that the gift is given due to the friendship;
- Items of little intrinsic value such as plaques or certificates, or items and services of de minimus value.
 - “De minimus” is defined as anything less than \$25 in value.
- Tickets – face value must be paid by the official.
- Anything for which you pay “full price.”
- E-Bay Rule - Non-tangible advice or favors.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

- Group Function Exceptions to “Thing of Value”
 - Educational Function
 - Economic Development Function
 - Widely Attended Events
 - Work Sessions

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

▪ Educational Function

- A meeting, event, or activity held within the State of Alabama, or if the function is predominantly attended by participants from other states, held within the continental United States, which is organized around a formal program or agenda of educational or informational speeches, debates, panel discussions, or other presentations concerning matters within the scope of the participants’ official duties or other matters of public policy (including social services and community development policies) economic development or trade, ethics, government services or programs, or government operations, and which, taking into account the totality of the program or agenda, could not reasonably be perceived as a subterfuge for a purely social, recreational, or entertainment function.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

▪ Educational Function

- An event
- with a formal program or agenda
- concerning matters of public policy
- which could not be perceived as a subterfuge for a purely social function.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

▪ Economic Development Function

- Any function reasonably and directly related to the advancement of a specific, good-faith economic development or trade promotion project or objective.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

▪ Widely Attended Event

- A gathering, dinner, reception, or other event of mutual interest to a number of parties, at which it is reasonably expected that more than 12 individuals will attend and that individuals with a diversity of opinion will be present.
- According to the Ethics Commission, to be permitted, a widely attended event must have some public purpose, however minimal.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

- Work Session
 - Work Session is not defined in the Act.
 - As a result, Ethics Opinion 2011-5 to the Alabama Road Builders Association discussed what constituted a Work Session and what was allowed.
 - A Work Session must concern a project that the public official involved in has an official interest in completing.
 - So, a Work Session does include ALDOT and those working on a ALDOT project meeting over a meal to discuss the project and what must be done.
 - A Work Session does not include hospitality such as golf where it is provided immediately following the conclusion of the meeting.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

- Group Functions – Travel and Lodging - Allowable Expenditures for Educational Functions, Economic Development Functions and Widely Attended Events:
 - Payment or reimbursement for transportation and lodging costs for public officials or public employees and the spouse of a public official or public employee is allowed.
 - Travel expenditures for a spouse are not permitted for an Economic Development Function
 - The entity providing the reimbursement must be “a primary sponsor” of the event.
 - This exclusion only applies if the public official is a meaningful participant in the event, or if the public official’s attendance is “appropriate to the performance of his or her official duties or representative function.”

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

- All Group Functions – Meals and Hospitality - Allowable Expenditures:
 - Hospitality, meals and other food or beverages provided as an integral part of an educational function, economic development function, a work session, or a widely attended event such as a luncheon, banquet, or reception hosted by a civic club, chamber of commerce, charitable or educational organization, or trade or professional association.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

- Allowable Expenditures – Lobbyists and Principals
- If an event does not fall within one of the group function exceptions:
 - Lobbyists may provide food and beverages to public officials or public employees up to \$25 per meal.
 - Lobbyists may not spend more than \$150 in the aggregate on any one public official or employee per year.
 - Principals may provide food and beverages to public officials or public employees up to \$50 per meal.
 - Principals may not spend more than \$250 in the aggregate on any one public official or employee per year.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

“Thing of Value” and Hospitality

- Allowable Expenditures – Lobbyists and Principals
 - Aggregation – A single entity (company) that is a Principal is limited to an aggregate of \$250 in a calendar year on any one public official or public employee.

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Alabama’s Ethics Act
Edward A. “Ted” Hosp
thosp@maynardcooper.com

1901 Sixth Avenue North 2400 Regions Harbert Plaza Birmingham, Alabama 35203-2618 205-254-1000 Fax 205-254-1999
www.maynardcooper.com

THE STRUCTURE AND OPERATION OF THE ALABAMA ETHICS COMMISSION

Edward A. "Ted" Hosp
thosp@maynardcooper.com
334-233-7157 (cell)

The December 2010 Special Legislative Session called by Governor Bob Riley to focus on Alabama's Ethics Act included measures not just directed at the substance of the law, but also the structure and power of the Ethics Commission itself. Specifically, Senate Bill 1, introduced by Senator Cam Ward and which became Act 2010-763, made several changes to the Commission. This paper examines the Ethics Commission, and its make-up and powers with a particular focus on changes made by the Legislature to those areas in the past five (5) years.

I. Composition of the Ethics Commission

A. Appointment of Members to the Commission

The Ethics Commission consists of five (5) members, appointed to staggering five (5) year terms of office. Ala. Code § 36-25-3(a). The members are appointed by the Governor, the Lieutenant Governor and the Speaker of the House of Representatives. Ala. Code § 36-25-3(a). As originally conceived, the appointments to the Commission would be made jointly by these three officials, in consultation with each other, thus creating consensus appointments. In practice, however, the appointments have simply rotated with the next official in line making the appointment to fill any vacancy. Even with this practice of rotating appointments, one of the strengths of the Alabama Ethics Act often cited by outside entities is the fact that the members of the Commission are not appointed by a single official, to which they all might then be beholden, and the fact that the term of office (5 years) exceeds any single term of office of the appointing officials (4 year) by one year.

B. Qualifications for Appointment to the Ethics Commission

Prior to 2010, the Ethics Act stated that the only qualification for members of the Commission was that they be "fair, equitable citizen[s] of this state and of high moral character and ability." Ala. Code § 36-25-3(a). This provision remains the same, as does the exclusion from eligibility for appointment of those who are public officials, candidates, registered lobbyists or principals, and former employees of the Commission. *Id.* Additionally, Commissioners still are not eligible for reappointment to succeed themselves. *Id.* The new version of the Code makes one change, however, by including a requirement that at least one member of the Commission be a licensed Alabama attorney in good standing. Ala. Code § 36-25-3(a).

Members of the Commission are not paid for their service, although they are entitled to a per diem of fifty dollars (\$50) per day when "serving on the business of the commission". They also are entitled to reimbursement for travel expenses incurred in the performance of commission duties. Ala. Code § 36-25-3(d).

Commission members and the staff of the Commission are prohibited from engaging in partisan political activities while serving. This prohibition extends to the making of campaign contributions at any level of government within the state. Ala. Code § 36-25-3(e). Commissioner and staff are permitted to vote. *Id.*

C. Confirmation of Appointments by the Alabama Senate

Members of the Ethics Commission must be confirmed by the Alabama Senate. Ala. Code § 36-25-3(a). In 2010, Alabama Code § 36-25-3(f) was amended to include a provision also requiring that the appointment of the executive director for the Commission be subject to Senate confirmation. That provision states that if the Senate fails to vote on the director's confirmation before adjourning sine die during "the session in which the Director is appointed, the appointee is deemed to be confirmed." It states further that "no appointee whose confirmation is rejected by the Senate may be reappointed."

II. Ethics Opinions

One of the Commission's primary duties is to issue opinions regarding the Ethics Act. Ala. Code § 36-25-4(a)(9). The opinions can be based on real or hypothetical circumstances. Opinions insulate from liability under the Act the person receiving the opinion – as well as all others in materially similar circumstances who reasonably rely on the opinion.

III. Ethics Complaints

The Commission also is charged with investigating possible violations of the Ethics Act, and reporting such violations to law enforcement when appropriate. Ala. Code § 36-25-4(a)(7) & (8).

A. Confidentiality of Complaints

Complaints submitted to the Commission are confidential, and the Commission is subject to the same secrecy laws as are grand juries. Ala. Code § 36-25-4(b). Violation of the confidentiality provision is a Class C felony. *Id.* This prohibition applies to the members of the Commission and its staff. It does not appear in any way to prohibit an individual who files a complaint from discussing the matter – or from issuing a press release regarding the complaint.

Code section §36-25-4.1 prohibits complaints from being made available to the public or available on the internet by the Commission until the disposition of the matter. Additionally, if a complaint is dismissed or found not to have probable cause, such complaint is not to be made public or available on the Internet at all, although the disposition, *i.e.*, that it was dismissed, may be made available. *Id.*

B. Investigation of Complaints

Prior to 2010, the Ethics Act stated that complaints could not be investigated unless the person making the complaint had “actual knowledge” of the events and information contained in the complaint. This had been interpreted to prohibit investigation of complaints that were made based on news reports and stories. Act 2010-763 changed this law and now allows investigation of complaints where the person making the complaint has “credible and verifiable information supporting the allegations contained in the complaint.” Alabama Code § 36-25-4(c). There remains a prohibition on the investigation of an anonymous complaint, and a person may not file a complaint on behalf of another. *Id.*

In the first instance, it is the duty of the Director to review any complaint and make a determination whether an investigation is warranted. Ala. Code § 36-25-4(c). In the event the Director determines an investigation is not appropriate, the complaint can be dismissed –but this action must be reported to the Commission. Prior law allowed the Commission to overrule the Director and initiate an investigation, but only on the unanimous written consent of all five Commission members. As amended in 2010, the law now allows the Commission to authorize an investigation on the written consent of four of the five Commission members. Ala. Code § 36-25-4(c). Further, the Commission previously could file a complaint itself, but only by a unanimous vote of all five Commission members. This requirement has also been changed to require four of the five members of the Commission to vote to file a complaint.. Ala. Code § 36-25-4(c).

In the event the Commission votes to initiate an investigation or a complaint, the Commission steps aside from any further involvement. Any hearing on the matter must be conducted by three active or retired judges, appointed by the Chief Justice of the Supreme Court. Ala. Code § 36-25-4(c).

C. Subpoena Power of the Commission

One of the primary reasons for the introduction of Senate Bill 1 was to give to the Ethics Commission subpoena power. Pursuant to new Code section 36-24-4(g), the Commission now may issue subpoenas for witnesses and for the production of documents upon a vote of four members of the Commission following the “express written request of the Director.” A person receiving a subpoena has ten days to object to that subpoena. If the subpoenaed individual objects, the subpoena does not issue until a state court enters an order dismissing, modifying or issuing the subpoena. The court has 30 days in which to rule on the objection.

D. Timing and Procedure for Resolution of a Complaint

The subject of a complaint does not receive notice of a complaint when it is initially filed. In fact, if the matter is disposed of administratively by the Director, as many complaints are, it is likely that the accused will never know that a complaint was filed at all. However, if the complaint is one that proceeds to a hearing before the Commission, the respondent is entitled to notice not less than forty-five (45) days prior to the hearing. The respondent is entitled to a continuance of the hearing of thirty (30) days.

The respondent has the right to counsel at the hearing, and cannot be compelled to testify, though the respondent may choose to do so. The Commission must provide discovery to the respondent pursuant to the Alabama Rules of Criminal Procedure.

The 2010 changes to the Ethics Act also placed some time constraints on the resolution of complaints. Specifically, amended code § 36-25-4(h) states that the Commission has 180 days to determine and resolve a complaint. If the Commission does not find probable cause within 180 days of the commencement of the complaint, the complaint “shall be deemed dismissed and cannot be reinstated based on the same facts alleged in the complaint.” The staff of the Council “upon good cause shown from the General Counsel and Chief investigator” may request a one-time extension of 180 days. That request must come from the Director to the Commission and may be granted upon a majority vote of the Commission. The staff may request, and the Commission may grant only one 180 day extension. *Id.*

E. Referral to the Attorney General or District Attorney

If the Commission finds there is probable cause that a violation has occurred, that finding is referred to the Attorney General or to the district attorney for the jurisdiction in which the alleged violation took place. It is up to the D.A. or the A.G. at that point to charge the official, however, and a referral alone does not constitute a finding of an ethics violation. Additionally, the Ethics Act specifically notes that District Attorneys and the Attorney General may prosecute individuals for ethics violations without the need for a finding of probable cause by the Commission. Ala. Code §36-25-27(c).

According to new Code §36-25-4(i), upon written request of the Commission, the Attorney General or District Attorney to whom a case was referred may notify the Commission as to whether or not he or she intends to take action on the complaint. Additionally, the Attorney General or District Attorney may inform the Commission of the final disposition of a case. Finally, the Director may request an oral status update from the Attorney General or District Attorney from time to time.

IV. Penalties

An intentional violation of any aspect of the Ethics Act, other than a disclosure requirement, is a Class B Felony. Ala. Code §36-25-27(a)(1). Other violations, including a violation of the disclosure requirements, are Class A Misdemeanors, as are knowingly filing a false report or complaint, or making false statements to an employee of the Commission. Ala. Code §36-25-27(a)(2-5). As noted above, the penalty for intentionally violating the secrecy of the Ethics Act was increased in 2010 from a Class A Misdemeanor to a Class C Felony. Ala. Code §36-25-27(a)(6)

The statute of limitations for felony prosecutions under the Ethics Act is four years. Ala. Code §36-25-27(g). The statute of limitations for misdemeanor prosecutions is two years. Ala. Code §36-25-27(h).

The Commission retains the ability to administratively resolve complaints for minor violations and levy administrative penalties not to exceed \$1,000. Ala. Code §36-25-27(b). A complaint can be resolved administratively by unanimous vote of the commission members present at a meeting.

V. Ethics Training

The changes made in 2010 also added a new section to the Code regarding mandatory Ethics Training. New Code section 36-25-4.2 applies to lobbyists, legislators, state constitutional officers, cabinet members, executive staff, mayors, city council members and commissioners and county commissioners. Public employees that are required to file Statements of Economic Interest must also participate in a review of the Ethics Act that is available on line through the Commission website.

An Overview of Alabama's Ethics Act
Edward A. "Ted" Hosp

INTRODUCTION

Among the primary purposes of the Alabama Ethics Act are the promotion of accountability and transparency in government at the State, County and local levels. Ala. Code §36-5-2. These purposes are achieved under the Act by placing restrictions on public servants as to what they may do in their person and family financial dealings. At the same time, though, the Act also recognizes that in order to attract the most qualified individuals to public service, there must be some allowance for the private interests of public officials and employees, and their ability to generate outside income.¹ Ala. Code §36-5-2(b).

With that internal tension as a backdrop, this paper examines three key areas of the Ethics Act in an effort to provide guidance to public officials and public employees as well as those who interact with them. These areas are:

- 1) The provision of anything in order to corruptly influence official action;
- 2) The prohibition on the use of one's office for personal gain; and
- 3) The issues surrounding the receipt by an official of a "thing of value".

Since 2010, the Ethics Act has undergone several significant changes, most notably in the December 2010 Special Session called by departing Governor Bob Riley. Because of the extensive nature of the revisions, many of the new provisions are still being interpreted, and some have been tweaked in the intervening years by the Legislature. This paper is not legal advice. Each circumstance that arises in real life is fact specific, and officials and employees are strongly encouraged to seek legal advice from counsel, or from the Ethics Commission staff when faced with a concern.

¹ The Code contains separate definitions of "public officials" and "public employees". Ala. Code §36-5-1(26) & (27). The definition of public official is very broad, and includes any person elected or appointed to a government position at the State, County, or municipal level. Ala. Code §36-5-1(27). Public officials therefore include individuals who serve in an unpaid capacity, whether as members of local city councils or as members of local government boards or commissions. Additionally, it should be noted that the definition of "family member" for public officials is significantly more broad than the definition of family member for public employees. Ala. Code §36-5-1(14) & (15). Thus, restrictions as to what can be provided to family members, as discussed below, are different for these two categories. With that exception, the restrictions on what can be provided to public officials and public employees discussed in this paper are the same, and therefore for space reasons this paper generally will use the term public official.

I. GIVING OR RECEIVING ANYTHING TO CORRUPTLY INFLUENCE OFFICIAL ACTION

Prior to 2010, Code §36-5-7 prohibited the giving and receiving of a “thing of value” to a public official for the purpose of influencing that person’s official action. Although the language used in section 7 did not on its face appear to require an explicit quid pro quo agreement (“influencing official action” as opposed to “in exchange for an official act”), the provision was generally viewed as a standard anti-bribery statute that required a quid pro quo. This interpretation was noted by the Ethics Commission in a 2010 opinion in which it stated, “[s]ince 1995, when the previous Ethics Law went into effect, all the activities set out in this opinion were permissible under the above-listed exceptions, unless they were offered in exchange for official action on the part of the public official or the public employee.” Ethics AO 2011-01 at 7.

The 2010 changes to the Act modified section 7 to remove the requirement that the thing given to influence official action be a “thing of value.” Thus, under the new section 7, if a person offered a public official (or a public official accepted) anything, “whether or not the thing . . . is a thing of value,” in order to influence official action, that person violated the law. Ala. Code § 36-5-7(a-c).

This change created a potential problem if it was interpreted to eliminate the requirement that there be a quid pro quo agreement, particularly for lobbyists whose primary purpose is to influence official action. If a lobbyist took a public official to dinner to discuss a policy or legislation, was that dinner given “for the purpose of influencing official action”? The logical conclusion is “yes.” Thus, it would not have mattered that the meal fit within an exception to the definition of “thing of value” because if a thing given was to influence official action it was prohibited under all circumstances.²

As a result, in the 2011 Regular Session, the Legislature inserted the word “corruptly” into section 7’s prohibition. Under current law, it is prohibited for a person to provide a public official or for a public official to accept anything - if the thing is provided in order to “corruptly influence” the official’s official action. The Legislature defined “corruptly” to mean “to act voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.” § 36-25-7(e).

The addition of the word corruptly has been interpreted as restoring the requirement that to violate section 7, there must be some sort of bargained for exchange or agreement between the public official and the person providing the item.

² Even more absurd, under the language passed as part of section 7 in the 2010 Special Session, if a person handed a legislator a list of talking points as to why a particular bill should be passed (or killed), that person arguably would have violated the statute because they would have provided a public official with something for the purpose of influencing official action.

II. USE OF OFFICE FOR PERSONAL GAIN

One of the obvious purposes of the Ethics Act is to prevent public officials and public employees from personally profiting as a result of their public role. Thus, the Act contains a prohibition on the use of one's public office for personal gain. Alabama Code § 36-25-5. Section 5(a) of the Act states

“No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. . . .”

A. Active Use of Office for Personal Gain

1. Public Official or Public Employee

In order to find that a public official has used his or her office for personal gain, there are several elements that must be present. The first, and most obvious, is that the person involved must be a public official or public employee.

According to the statute, and as noted above, the definition of a public official is very expansive. Ala. Code §36-5-1(27). That section states that a public official is “[a]ny person elected to public office, whether or not that person has taken office by a vote of the people at state, county, or municipal level of government, or their instrumentalities including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government, or their instrumentalities including governmental corporations . . .”³ *Id.*

The definition of a public employee is “[a]ny person employed at the state, county, or municipal level of government or their instrumentalities, including government corporations . . . Ala. Code §36-5-1(26).

The remaining elements necessary for a violation of section 5 are somewhat less straightforward, or at least are at times open to interpretation.

2. Use of Office

Second, the public official or employee must be shown to have used his or her office in some way. This means that the person must have done something, or exerted some influence that was only possible because of the person's public role. The most obvious example of such actions would include voting to approve a contract in which the official has an interest, but there

³ The definition of a public official also purports to include the chairs and vice chairs of “each state political party.” Ala. Code §36-5-1(27).

are more subtle means by which a public servant can use his or her office. For example, any action by an official to promote a particular project, or persuade others to vote for or against a matter could be considered an improper use of office.

3. To Achieve Gain

Next, there must be some form of identifiable gain to either the public official, one of their family members, or a business with which the official is associated. Unfortunately, what constitutes “gain” is not defined by the Ethics Act. The term has been interpreted very broadly in at least one court decision from 1994, though. In *Chandler v. State*, 615 So. 2d 100 (Ala. Crim. App. 1994), the Court of Criminal Appeals examined an instance where the mayor of a town had allegedly used his office for personal gain by steering an economic development project to land that he owned. The mayor argued that he had realized no gain, because he sold the land at a price significantly lower than the appraised value. The Court disagreed, and found that the mayor had achieved gain in part because the sale price was higher than the price for which the property had been purchased decades earlier.

Absent additional guidance, it should be assumed that both the Ethics Commission and prosecutors will take the broadest view of what might be considered gain.

4. For Himself, a Family Member, or a Business with which He is Associated

Finally, the prohibition on the receipt of gain is not limited to the public official or employee, but extends to his or her family members and any business with which he or she is associated. A family member of a public employee is very limited. Section 36-25-1(14) states that a family member of a public employee is simply “[t]he spouse or a dependent of the public employee.” In contrast, a family member for a public official is very broad. According to §36-25-1(15), a family member for a public official is “the spouse, a dependent, an adult child and his or her spouse, a parent, a spouse’s parents, a sibling and his or her spouse, of the public official.” Any action taken by a public official or employee that results in a benefit to any of those falling within the definition of a “family member” is a violation of section 5 of the Ethics Act.

The definition of a “business with which the person is associated” is similarly broad, especially for public officials, because it incorporates the expansive definition of family member. It includes “[a]ny business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business.” Ala. Code §36-25-1(2). Thus, nearly any business with which an official or employee – or one of his or her family members – is connected in any way is likely a business with which that person is associated. And any gain realized by that business that the official played any role in, is a violation of section 5.

5. Steps to Take to Avoid a Section 5 Violation

As noted in the introduction, public officials are entitled to pursue private financial success, and the fact that a public official or one of their businesses or family members may have achieved gain standing alone does not constitute a violation of the Ethics Act. What the Ethics

Act concerns itself with is the use of the office. Where there is no use of an office, the gain is most likely permitted.

In order to prevent running afoul of the Act, there are several steps that public officials and employees should take in order to insulate themselves from an accusation that they have used their office for gain.

- 1) DISCLOSE: A public official or employee should first immediately and publically disclose any interest that they, a member of their family, or any business with which they are associated may have in a particular matter;
- 2) DO NOT PROMOTE OR STEER: The official or employee should refrain from discussing, promoting or steering the matter in any particular direction;
- 3) ABTAIN: The public official should formally – preferably in writing or with some other form of documentation - abstain from any discussion, decision or vote on the matter. They should also strongly consider leaving the room when there is any discussion or vote on the issue;
- 4) GET AN OPINION: Public officials and employees should consider seeking a written opinion regarding any matter in which they, one of their businesses or one of their family members has an interest. Opinions from the Ethics Commission offer the most protection, but helpful opinions can also be obtained from the government attorney for the particular government entity involved, or from a private attorney.

B. Sphere of Influence

In addition to the affirmative use of one's office for gain, the Ethics Commission has expanded the grounds for a possible section 5 violation to include more subtle forms of pressure that may be exerted by public officials. Specifically, the Commission has stated that when an official seeking business for himself or a family member interacts with an entity over which the official has some form of power or control, that official may be in violation of the Ethics Act.

This prohibition of acting within one's "sphere of influence" was introduced by the Commission in Opinion 2000-20 to Rep. Oliver Robinson. As yet, the analysis has only been extended to public officials in their interactions with public entities over which they have some power. However, it is logical to believe that the sphere of influence analysis could be applied to interactions between public servants and private entities as well – where the official or employee was in a position to exert control or power over the private entity.

Under the current formulation of the prohibition of acting within one's sphere of influence prohibition, a public official is not permitted to seek work, contracts, grants, or any other benefit for himself, his family members or any business with which he is associated from another public entity that is within the official's "sphere of influence." The sphere of an official's influence is best conceptualized as an official's reach of power or authority as a public official. Where an official is in a position – by virtue of their public office – to exercise some

measure of control over the entity with which he is interacting, the official is operating within his sphere of influence. The concern articulated by the Commission is that the official's power alone might create undue pressure on the other entity thus rendering it difficult to refuse the official's entreaties.⁴

A state official or legislator would have the broadest sphere of influence because they influence all public entities in Alabama. In contrast, a County official's sphere of influence would presumably be limited to other public entities within that particular county.

III. THE RELEVANCY OF A "THING OF VALUE"

Since 2010, the Ethics Act (Ala. Code §36-25-5.1(a)) has specifically prohibited both lobbyists and principals from providing any "thing of value" to a public official or public employee.⁵ According to the Act,

no lobbyist, or subordinate of a lobbyist or principal shall offer or provide a thing of value to a public employee or public official or family member of [those individuals].

Ala. Code § 36-25-5.1(a). This section similarly prohibits public employees or public officials and their family members from soliciting or receiving a thing of value from a lobbyist, subordinate of a lobbyist or principal. *Id.* Thus, it is clear that neither a lobbyist nor a principal can provide to a public official or his or her family members a "thing of value."

Prior to the 2010 Amendments to the Ethics Act, including the additional of §5.1(a), the staff of the Ethics Commission interpreted the definition of what was (and what was not) a "thing of value" as creating a blanket prohibition on the receipt of such items by public officials. Prior to the inclusion of a specific prohibition for lobbyist and principals, this interpretation appeared somewhat reasonable. However, in the author's view, the 2010 revisions that singled out two groups (lobbyists and principals) and prohibited them and only them from providing any "thing of value" must mean that the prohibition was not intended to apply to anyone else.

⁴ Given the fact that a section 5 violation of the Ethics Act is a felony requiring intent on the part of the official, it is difficult to envision how there could be a prosecution for merely operating within one's sphere of influence without a further examination of the actor's specific motivation and intent in connection with the particular transaction.

⁵ The Act states that a lobbyist "includes any of the following:"

1. A person who receives compensation to lobby. That is, anyone paid to influence legislation, regulations or the award of contracts of grants by the state;
2. A person who lobbies as a "regular or usual part of employment;
3. A consultant to any government entity who is employed to influence legislation or regulations regardless of the funds from which that person is paid;
4. Any employee or consultant of a lobbyist who regularly communicates with members of a legislative body."

Ala. Code § 36-25-1(21)(a). A principal is "[a] person or business which employs, hires or otherwise retains a lobbyist". Ala. Code § 36-25-1(24).

That said, while the author may disagree with the Commission staff's interpretation, it is important to be aware of it, and advisable to act in accordance with the staff's interpretation unless or until their opinion is changed.⁶

VI. WHAT IS (AND IS NOT) A THING OF VALUE?

"Thing of value" is defined very broadly, and includes essentially everything that has any monetary value. However, there are numerous exceptions to the definition.

A. General Exclusions from "Thing of Value":

The following items are specifically excluded from the definition of a "thing of value," and therefore can be provided to public officials and public employees:

1. Campaign contributions or contributions to an inaugural or transition committee;
2. Anything given by a family member "under circumstances which make it clear that the gift is [the thing given] is motivated by a family relationship";
3. Anything given by a friend under circumstances which make it clear that the gift is given due to the friendship;
4. Items of little intrinsic value such as plaques or certificates, or items and services of de minimus value;⁷
5. Anything that is available to the general public such as loans, discounts, and "opportunities and benefits, and rewards and prizes given in contests or events including random drawings;"
6. Anything paid for by a governmental entity, except tickets to sporting events offered by an educational institution to anyone other than faculty, staff or administration of the institution;
7. Anything for which the official or employee pays full (face) value;
8. Benefits earned by a public official or employee through a non-government employer where it is clear that those benefits are provided for reasons unrelated to the person's public service.

⁶ It appears that, at least as to public officials and public employees, the Commission staff may view the receipt of a thing of value" from individuals other than lobbyists and principals as a "use of office for personal gain." Obviously, anything given with the intent to corruptly influence official action would be a violation of § 36-25-7.

⁷ In 2012, the Legislature added a definition of "de minimus." Under that definition, items valued at \$25 or less, and \$50 in the aggregate from any single source, may be provided to public officials.

Ala. Code § 36-25-1(34)(b)(1-10)

B. Group Meetings, Receptions and Conferences

There are several exceptions to the definition of “thing of value” that deal with group meetings, receptions and conferences. Under those exceptions, a “thing of value” does not include:

1. Reimbursement for transportation and lodging for public officials or public employees attending education function or a widely attended event when the person providing the reimbursement is a primary sponsor. This exclusion only applies if the public official is a meaningful participant in the event, or if the public official’s attendance is “appropriate to the performance of his or her official duties for representative function;”
2. Reimbursement for travel and expenses in connection with participation in an economic development function;
3. Hospitality, meals and other food or beverages provided as an integral part of an educational function, economic development function, a work session,⁸ or a widely attended event.

Ala. Code § 36-25-1(34)(b)(12-14).

1. Educational Function

An educational function must be organized around a formal program or agenda concerning matters within the scope of the participant’s official duties or other matters of public policy, economic trade or development, ethics, government services or programs, or government operations.

The definition states that “taking into account the totality of the program or agenda [it] could not reasonably be perceived as a subterfuge for a purely social, recreational, or entertainment function.” Ala. Code §36-25-1(13). If the function is primarily attended by individuals from Alabama, it must take place in Alabama. If it is predominately attended by individuals from other states, it can take place out of State, but still must take place in the continental United States. Ala. Code § 36-25-1(13).

Transportation and lodging may be provided for an educational function, but only by a primary sponsor of the event, and only if the public official is a “meaningful participant” in the event. Ala. Code § 36-25-1(34)(b)(12). Additionally, according to the exceptions to the definition of a thing of value, hospitality may be provided at an educational function, but the language states that the hospitality must be “an integral part” of the event. Ala. Code § 36-25-1(34)(b)(14).

⁸ There is no definition for “work session” in the legislation.

2. Economic Development Function

An economic development function is one reasonably “and directly related to the advancement of a specific, good faith economic development or trade promotion project or objective.” Ala. Code § 36-25-1(12). Despite the use of the word “specific,” the economic development function exception has been applied to general events such held by Chambers of Commerce promoting business in a particular area, or by trade associations promoting industry from a particular part of the world.

Travel and lodging of a public official or employee may be paid to “facilitate a public official’s or public employee’s participation in an economic development function.” Ala. Code § 36-25-1(34)(b)(13). As in the case of an educational function, hospitality may be provided as part of an economic development function if the hospitality is an integral part of the function. Ala. Code § 36-25-1(34)(b)(14).

3. Widely Attended Event

A widely attended event is “any gathering, dinner or reception at which it is reasonably expected that more than 12 individuals will attend.” According to this definition, the participants must have “mutual interests,” but the attendees must include “individuals with a diversity of views or interests.” Ala. Code § 36-25-1(36). The Commission has interpreted these requirement to mean that in order to qualify as a “widely attended event” the event must have some public purpose, though that purpose may can be minimal. Ethics AO 2011-09.

If the event is one organized around a formal agenda, and the public official or employee is a meaningful participant, transportation and lodging may be provided by a primary sponsor of the event. Ala. Code § 36-25-1(34)(b)(12). Hospitality may be provided if it is an integral part of the event. Ala. Code § 36-25-1(34)(b)(14).

In general, the exception for widely attended events is broader than the exceptions for educational functions and economic development functions. As a result, so long as more than twelve (12) people are expected to attend, many events that would not qualify as educational functions or economic development functions would qualify as a “widely attended event”.

4. General Rules for Group Events and Functions

There is no limitation on the amount that can be spent on travel, hospitality or entertainment for a public official or public employee if the event qualifies under one of the group event exceptions. However, travel and lodging can only be provided by a sponsor of the event. It also can only be provided if the official is a meaningful participant, meaning that he or she performs a role such as speaker or panel participant or if the subject matter of the event concerns the person’s public role.

Hospitality, including food and beverages, can only be provided at a group event if it is an “integral part” of the function. Unfortunately, there is no definition of “integral part” of a function, although the dictionary definition of the word is “essential to completeness.” Unlike a

previous code section that restricted the provision of hospitality in certain circumstances to three consecutive days, there is no time limitation in the newly passed law.

5. Work Session

As noted above, the Act does not contain a definition of “work session”, even though it allows for expenditures to be made on food, beverages and hospitality when they are part of such functions. With no statutory guidance, the Ethics Commission was forced to fill in the gap with an opinion issued in 2011. AO No. 2011-05. In that opinion, and in subsequent opinions and discussions, the Commission and staff have indicated that work sessions are those that facilitate the continued work on a project or proposal.

In other words, where a meeting between government officials or staff and private individuals is taking place, and the purchase of a meal or refreshments would serve to continue that meeting, the expenditure likely falls under the work session” exception. The Commission has stated, however, that a golf game that immediately follows such a meeting would not fall into the exception, as the hospitality of the golf-outing could not be considered an “integral part” of the meeting itself.

C. Meals and Beverages Provided by Lobbyists and Principals

Also excepted from the definition of a thing of value are meals or beverages provided by a lobbyist to a public official not exceeding \$25 per meal, with an aggregate limit of \$150 per year. Principals are permitted to spend \$50 per meal on a public official, with a limit of \$250 per year.

It is important to remember, though, that if the provision of hospitality falls within a group event exception such as an educational function or a widely attended event, it is not a thing of value, and therefore does not fall within the \$25 or \$50 limitation for lobbyists and principals, nor does it count towards the \$150 or \$250 aggregated amount permitted for the calendar year.

D. Reporting Hospitality Provided to Public Officials

Under prior law, the definition of “thing of value” indicated that when more than \$250 in hospitality was spent on a public official or public employee during a single calendar day, the entire amount spent was required to be reported by the provider to the Ethics Commission.

Although this language has been eliminated from the definition section, lobbyists and principals still must file quarterly reports pursuant to Ala. Code § 36-25-19(a). Those reports require an itemization of the items outside the definition of “thing of value” provided to a public official in excess of \$250 in a twenty-four (24) hour period.